In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1735

LEONARD RUSSO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of New York, petitioner and a co-defendant (McCarthy) were convicted of a conspiracy to violate 18 U.S.C. 1954 by paying illegal kickbacks to a union agent. Another co-defendant, Wenger, was convicted of receiving such payments in violation of 18 U.S.C. 1954. Petitioner was sentenced to two years' imprisonment and a $5,000 fine. The court of appeals affirmed.

The facts of this case are stated in detail in the opinion of the court below (Pet. App. 2a-6a). Briefly, petitioner was a middleman in a scheme whereby Wenger, a counsel for the Teamster's Union

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Pension Fund, received kickbacks in exchange for channeling approximately $1 million in Pension Fund moneys into a hospital construction project in Fairlawn, New Jersey. Petitioner received a total of $21,500 for his role in the conspiracy. The chief witness, and a participant in the scheme, was Herbert Itkin, a government informer who was also the chief witness in a number of other criminal trials.[1]

1. Petitioner contends the trial court erred in admitting evidence of acts that occurred prior to June 19, 1962, the effective date of 18 U.S.C. 1954, under which petitioner's activities were illegal. The evidence at trial established that the agreement underlying the conspiracy could be traced back to 1961, and that the scheme continued without interruption until well after June 19, 1962. All of the overt acts presented to the jury occurred after that date,[2] including a $5,000 payment from Itkin to petitioner (Tr. 170, 432–434; see Pet. App. 7a). The trial court instructed the jury that it could find that the "conspiracy" was formed in 1961 but cautioned that, in order to convict, the jury also had to find that the conspiracy had not come to an end prior to June 19, 1962, and that at least one of the overt acts charged in the indictment occurred after that date (Tr. 1702, 1703–1704, 1708–1709).

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[1] See *e.g.*, *United States* v. *Corallo*, 413 F. 2d 1306 (C.A. 2), certiorari denied, 396 U.S. 958; *De Sapio* v. *United States*, No. 1395, this Term, certiorari denied May 24, 1971.

[2] Overt Acts 1, 2, 3 and 4 in the indictment occurred before June 19, 1962. With the government's consent these acts were not presented to the jury (Tr. 13–15).

Petitioner argues that the government should have limited its proof to events occurring after June 19, 1962. It would have been virtually impossible to explain the conspiracy to the jury without reference to the original agreements and arrangements that took place before the effective date of the statute. Although those events were not themselves violations of the law, they clearly provided the necessary background for proving the acts charged. Evidence of the plans and preparations for a crime are material and relevant evidence. *United States* v. *Hickey*, 360 F. 2d 127, 140 (C.A. 7), certiorari denied, 385 U.S. 928. Proof of an agreement in effect before the statute rendered the proposed conduct illegal is thus admissible with relation to a conspiracy that continued after the effective date of the statute and where overt acts were committed after the effective date. *Parr* v. *United States*, 255 F. 2d 86 (C.A. 5), certiorari denied, 358 U.S. 824; *Christianson* v. *United States*, 226 F. 2d 646, 652 (C.A. 8), certiorari denied, 350 U.S. 994; see *United States* v. *Wechsler*, 392 F. 2d 344 (C.A. 4), certiorari denied, 392 U.S. 932.[3]

Petitioner also claims that the conspiracy terminated prior to June 19, 1962, since the Pension Fund had issued its commitment for the mortgage loan on January 29, 1962 (Pet. 18). As the court below pointed out (Pet. App. 6a–7a), after the effective date of the statute, Wenger, the counsel to the Pension Fund, refused to obtain an extension of the loan pay-

[3] For similar reasons, evidence of events committed beyond the statute of limitations is admissible. *Continental Baking Co.* v. *United States*, 281 F. 2d 137, 154 (C.A. 6).

off date until he received $5000, and the primary borrower, Giamonco, ultimately paid $15,000 for the extension. Petitioner received $1500 of that amount. The scheme to make "kickbacks" thus continued after the statute made such payments illegal. See *United States* v. *Wechsler,* 392 F. 2d 344 (C.A. 4), certiorari denied, 392 U.S. 932.

2. Petitioner contends that denial of a request for a psychiatric examination of Itkin, made by another defendant (McCarthy), constitutes error. The fact that Itkin had consulted a psychiatrist for a short period (Pet. 6) hardly amounts to a showing that he was incompetent to testify. His veracity as a witness was, as the court below pointed out (Pet. App. 11a), thoroughly explored at trial and the negative aspects of his character were brought before the jury.

For the same reasons, the court below was also correct in ruling that exclusion of Mario Brad's testimony that he would not believe Itkin under oath did not constitute reversible error with respect to petitioner.

3. The events leading to the prosecution in this case took place between 1961 and 1963; the indictment was returned on May 27, 1968. The government did not act sooner because of the need to preserve the cover of the government's informer and key witness in this case, Herbert Itkin, in order to develop other prosecutions. Petitioner contends that the delay in bringing the indictment deprived him of due process and violated his right to a speedy trial.

This Court, in *United States* v. *Marion* (No. 810, this Term, probable jurisdiction noted March 1, 1971), presently has under consideration the question whether delay short of the applicable statute of limitations may justify dismissal of an indictment and, if so, what degree of prejudice must be shown. Here petitioner has made no showing of prejudice. Petitioner argues that Itkin was an unreliable witness, but the extensive cross-examination of Itkin shows not only that the question of Itkin's veracity was fully explored at trial, but also that petitioner and his co-defendants had no difficulty in remembering or reconstructing the events involved in the indictment. (Petitioner did not object to the pre-indictment delay until the close of the government's case.) The court of appeals therefore correctly found that petitioner had not been prejudiced by the government's waiting to seek an indictment until the 5-year statute of limitations had nearly run, in order to preserve Itkin's cover (Pet. App. 10a). In these circumstances we do not believe it necessary for the Court to withhold action pending decision in *Marion*.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE 1971.

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